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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-40

HARRY E. O'DELL, JR., a minor, by his parents and next friends, HARRY E. O'DELL, SR., and JOYCE FLORAY and HARRY E. O'DELL, SR., and JOYCE FLORAY, Individually,

Petitioners,

vs.

SCHOOL DISTRICT OF INDEPENDENCE, MISSOURI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS BELL BURRUS
203 North Main Street
Independence, Missouri 64050
816-252-9050
Attorney for Respondent

E. L. MERSERSMALL, INC., 920 Cherry Street, Kansas City, Mo. 64106, 421-2020

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STATEMENT OF THE CASE

The statement of the case as found in petitioners' petition at pages 4, 5 and 6 fairly states the case.

It is an action in tort for personal injuries against the School District of Independence, Missouri. The defendant

filed a motion to dismiss "for the reason said petition fails to state a claim upon which relief can be granted" (A49). Thereafter the trial court sustained the motion (A44), and thereafter necessary proceedings were taken to appeal the matter to the Supreme Court of Missouri.

The Supreme Court, En Banc, after briefs and arguments, and after granting the State of Missouri, by its Attorney General, leave to appear and file brief and participate in the oral argument, rendered its opinion affirming the lower Court's dismissal.

The grounds of the affirmance were that the School District was not suable for a tort of its agent on the grounds of governmental immunity (A 1 et seq.).

QUESTIONS PRESENTED

1. May the State of Missouri withhold consent to suits against it and its political subdivision, School District of Independence, for claimed tortious acts of its employees?

2. Did the enactment by the General Assembly of an act which provides for some designated state employees, but not including school districts, to have some claims paid from a "Tort Defense Fund" constitute a waiver of the governmental immunity or deny the Petitioners equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by allowing recovery by some claimants but denying recovery to others?

REASONS FOR DENYING THE WRIT

I

The Question Denying the Right to Sue a State or an Agency Has Been Before This Court

The case of *Palmer et al.* v. *State of Ohio,* 248 U.S. 32, 39 S.Ct. 16, 63 L.Ed. 108 (1918) has decided the question. We quote from the opinion which is short with the following quotation:

> "The plaintiffs in error sued the State of Ohio for damages for flooding lands by elevating the spillway of a state maintained dam. The Supreme Court of the State affirmed the action of the lower courts in dismissing the petition on the ground that the State had not consented so to be sued and we have reviewed this decision.
>
> "The plaintiffs in error agree, as they must, that this suit cannot be maintained without the consent of the state, but they claim that such consent was given in an amendment to Sec. 16 of Article I of the State Constitution, adopted in 1912, which reads:
>
> " 'Suits may be brought against the State, and in such manner as may be provided by law.'
>
> "The State Supreme Court held that this amendment is not self executing, and that the General Assembly of the State having failed to designate the courts and manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"The right of individuals to sue a State, in either a federal or a state court cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. . . . Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which decision of the State Supreme Court is controlling with this court, no federal right being involved . . .

"The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States is palpably groundless. . . .

"No federal question being presented by the record, the motion to affirm is denied and this court, *sua sponte,* dismisses the writ of error for want of jurisdiction."

Therefore, the questions raised by petitioners herein have been settled, and there are sufficient grounds for the denial of the writ of certiorari.

II

That the Sovereign, Whether United States or State, Is Immune from Suit and Consent of Sovereign Is Necessary Before a Suit Can Be Maintained Against It Has Been Consistently Held by This Court

An early case is *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 15 L.Ed. 991 (1858).

Hans v. *Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Ex parte New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921).

Ford Motor Company v. *Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

Parden v. *Terminal Railway Company*, 377 U.S. 184, 191-192, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964).

The language used in *Beers*, supra, is plain and pointed:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. . . . it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted. . . ." l.c. 992.

In *Ex parte New York*, supra, l.c. 1060, the court wrote:

> "That a state may not be sued without its consent is a fundamental rule of jurisprudence, having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state, without consent given; . . ." l.c. 1060.

Suits against the United States have had the same standards in denial of rights to sue.

Gibbons v. *U. S.*, 75 U.S. 269, 19 L.Ed. 453 (1869); *Langford* v. *United States*, 101 U.S. 341, 25 L.Ed. 1010 (1890).

However, Congress has enacted the *Federal Tort Claims Act*, 28 U.S.C.A., Chapter 171, which permits a limited class of actions upon specific limitations.

In construing the right to sue, cases require that a claim against the United States must be shown to come within the terms of the act or it will be barred by sovereign immunity doctrine of the United States. *Dalehite* v. *United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); *Indiana Towing Company* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Laird* v. *Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed. 2d 499 (1972).

From these authorities, for this court to permit this case to come before it, would be in contravention to a settled body of law and would not be in keeping with a "fundamental rule of jurisprudence".

III

The General Assembly of Missouri Has Not Consented That Suits May Be Maintained Against School Districts for Alleged Torts of Its Servants

In addition to the cases referred to in the above paragraph II, it would be necessary for petitioners to show that the General Assembly has given consent for suits against its political subdivision which is exercising its constitutional duty of conducting public schools.

From the reading of petitioners' petition and from the opinion of the Supreme Court of Missouri, it is seen that no such consent has been granted.

The decision of the Supreme Court, En Banc, held and ruled that sovereign immunity was created by the Missouri General Assembly and has been reaffirmed by that body in many cases.

The Missouri Supreme Court (A 2) wrote:

"The two most recent frontal attacks in this Court on the doctrine of governmental immunity were made in Smith v. Consolidated School District No. 2, 408 S.W.2d 50 (Mo. banc 1966), and Payne v. County of Jackson, 484 S.W.2d 483 (Mo. 1972). In *Smith*, this Court declined to abolish the doctrine, and said (l.c. 54):

> "For more than a century the courts of Missouri have uniformly held generally that political subdivisions of the state are not subject to liability in suits for negligence. Reardon v. St. Louis County, 36 Mo. 555; Clark v. Adair County, 79 Mo. 536; State ex rel. Jordon v. Haynes, 72 Mo. 377; Cassidy v. City of St. Joseph, 247 Mo. 197, 152 S.W. 306; Lamar v. Bolivar Special Road District, Mo. Sup., 201 S.W. 890; Zoll v. St. Louis County, 343 Mo. 1031, 124 S.W.2d 1168; Todd v. Curators of University of Missouri, 347 Mo. 460, 147 S.W. 2d 1063; Cullor v. Jackson Township, Putnam County, Mo. Sup., 249 S.W. 2d 393. School districts are political subdivisions of the state. Art. 10, Sec. 15, Constitution of Missouri, V.A.M.S., Sec. 70.210, RSMo 1959, V.A.M.S. As such, school districts have long been held immune from liability in tort for negligence. Cochran v. Wilson, 287 Mo. 210, 229 S.W. 1050; Krueger v. Board of Education of City of St. Louis (Banc), 310 Mo. 239, 274 S.W. 811, 40 A.L.R. 1086; Dick v. Board of Education of City of St. Louis, Mo. Sup., 238 S.W. 1073. Our holdings have been so uniform that nothing is to be gained by restating the reasons for and against the doctrine of sovereign immunity."

On page A 9, the Missouri Supreme Court wrote in disposing of the attack upon the government immunity as follows:

> "The question then becomes: having determined that the common law adopted in Missouri when it came into the Union of states was, and has continued to be, that an action cannot be maintained for negligence *against the public*, (1) does this Court have the power to abrogate such doctrine; and (2) if so, should we do so?
>
> "It would seem arguable that, with the deletion in 1825 of the words 'until altered, or repealed by the legislature,' from the Act of 1816, supra, the legislature intended to give the courts some flexibility in our applications of what is now Sec. 1.010. However, we need not, and should not, definitively answer that question in this case. It is enough to say that, *if* we have such power, *we decline to assert it in this case involving so fundamental a doctrine as sovereign immunity.*" (Emphasis added)

We, therefore, submit it is the holding of the Supreme Court of Missouri, based upon the common law and the case law to the present time, there has been no consent given by the General Assembly of Missouri enabling suits against School Districts, and this Petition should be denied.

IV

The Missouri Tort Defense Fund Act, Section 105.710 R.S. Mo. Supp. 1975, Does Not Give Any Application to This Case nor Give Any Reason to Require a Retreat From the Age-Old Doctrine of Governmental Immunity

Petitioners at page 10 state: ". . . Additionally, the Court held that the 'Tort Defense Fund' which allows re-

covery against specified subdivision of the state does not violate equal protection as mandated by the Federal Constitution".

This is followed by the statement "the doctrine of governmental immunity denies them equal protection of the law and due process of law, and the Tort Defense Fund denies them equal protection of the law."

There are no Appellate Court decisions of Missouri on this act. The act is set out in Petitioners' Appendix at A 50.

The act begins by saying "As part of the compensation to be paid to the director of the department of corrections, (then follows several other public officers) the comptroller is authorized to pay from the 'Tort Defense Fund', which is hereby created, all final judgments awarded in Courts . . . to any claimant against the aforesaid officers . . . for acts arising out of and performed in connection with their official duties in behalf of the state. . ."

Nowhere is there any waiver of the governmental immunity.

The Missouri Supreme Court's opinion A 12 and A 13 answers the Petitioners as follows:

> "Plaintiffs finally assert that the doctrine of sovereign immunity denies them equal protection of the law and due process, and that the 'Tort Defense Fund' (Sec. 195.710, Laws 1973) denies them equal protection of the law. The 'Tort Defense Fund' was created to provide a limited form of indemnification to certain state officers, employees and members of the National Guard, against judgments awarded against them.
>
> "We are of the opinion that plaintiffs' assertion is without merit. Persons who seek recovery for negli-

gence against a private tort-feasor and persons who seek recovery under the 'Tort Defense Fund' are different classes of persons from those who seek recovery for negligence against the state or its political subdivisions. They are not similarly situated and they may be treated differently. Reed v. Reed, 404 U.S. 71 (1971); Krause v. State of Ohio, 31 Ohio St. 2d 132, 285 N.E. 2d 736 (Ohio 1972)."

We, therefore, submit there is no applicability of this case to place it in violation of the "equal protection of the law and due process" as defined by the Constitution.

CONCLUSION

The Missouri Supreme Court adhered to its age-old holdings (although attacks have been made and several recently) of governmental immunity being created by the adoption of the Common Law of England and by the continued failure of the General Assembly to modify or permit suits against school districts for claimants for injuries by the torts of its employees. But the Missouri Supreme Court on several occasions wrote it was for the General Assembly to act rather than the judicial branch to act. Thus recognizing the separation of powers, and leaving legislation to the General Assembly and the Courts to interpret the law.

Since the Missouri Supreme Court on several occasions wrote that any retreat from governmental immumity should come from the General Assembly rather than the Courts, that the General Assembly should give any consent, and prescribe to what extent and in what tribunals such causes should be brought. Having in mind, no doubt,

the Federal Tort Claims Act. However, the General Assembly has not seen fit to enact any such act and it is therefore submitted that the General Assembly is satisfied with the doctrine. It is, therefore, the law of Missouri.

For this court to grant its writ would be a step in the direction of striking down the case law as "an established principle of jurisprudence". We believe that what Chief Justice Burger wrote in his concurring opinion in *Flood* v. *Kuhn*, 407 U.S. 258, 32 L.Ed. 2d 728, 92 S.Ct. 2099, l.c. 2113, wherein he wrote:

> "I concur in all but Part I of the Court's opinion but, like Mr. Justice DOUGLAS, I have grave reservations as to the correctness of Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953); as he notes in his dissent, he joined that holding but had 'lived to regret it'. *The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled.* I agree with Mr. Justice DOUGLAS that *congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress;* it is time the Congress acted to solve this problem."

We again suggest that "the affairs of a great many people have rested for a long time" on this doctrine of governmental immunity, and, if it is to be changed, if at all, it should be by the Missouri General Assembly, and that "Courts are not the forum in which this tangled web ought to be unsnarled".

For schools as well as other governmental agencies to be held for torts, will require a great revamping of legislation to prescribe the extent to which actions can be main-

tained and courts in which they may be brought and limitations of actions, and other matters similar to the "Federal Tort Claims Act", and cannot be prescribed by judicial decision. Also, funds for payment would have to be provided by legislative act, since now it is unauthorized to spend tax monies for anything except educational costs.

The writ should not be granted.

Respectfully submitted,

RUFUS BELL BURRUS
203 North Main Street
Independence, Missouri 64050
816-252-9050
Attorney for Respondent